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No. 82-729

In the Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504, which restrict the printing or photographing of illustrations of United States currency and other obligations and securities of the United States, violate the First Amendment.
2. Whether 18 U.S.C. 504 is unconstitutionally vague.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following individuals were defendants in the district court and are appellants in this Court: H. Stuart Knight, Director, United States Secret Service; William French Smith, Attorney General of the United States; James R. D'Amelio, Special Agent in Charge, New York Field Office, United States Secret Service; and John P. Martin, Jr., United States Attorney for the Southern District of New York.

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W. Bowen & H. Neal, *The United States Secret Service* (1960) 35
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OPINION BELOW

The opinion of the district court (J.A. 117-153) is reported at 539 F. Supp. 1371.

JURISDICTION

The judgment of the district court (J.A. 155-156) declaring 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504 unconstitutional was entered on June 18, 1982. A notice of appeal (J.S. App. 36a-37a) was filed on July 16, 1982. Justice Marshall extended the time for docketing the appeal to and including October 27, 1982. The appeal was docketed on that date, and probable jurisdiction was noted on February 22, 1983 (J.A. 157). The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. The Fifth Amendment provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

3. 18 U.S.C. 474 ¶ 6 provides in pertinent part:

> Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any * * * obligation or other security [of the United States] or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

4. 18 U.S.C. 504 provides:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation
>
> for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions

of the section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;

(ii) all illustrations (including illustrations of uncancelled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of cancelled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms, or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purpose of this section the term "postage stamp" includes postage meter stamps.

STATEMENT

A. The Statutory Background

The Constitution expressly authorizes Congress to "coin Money [and] regulate the Value thereof" (Art. I, § 8, Cl. 5) and to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States" (Art. I, § 8, Cl. 6).[1] Pursuant to this authority, Congress, in Chapter 25 of the Criminal Code, 18 U.S.C. 471 *et seq.*, has enacted a comprehensive scheme to define and punish offenses involving the forgery or counterfeiting of the currency and other official obligations of the United States. The statutory scheme punishes the making, uttering, or dealing in counterfeit United States obligations or securities (18 U.S.C. 471, 472, 473); taking impressions of tools used to print United States obligations or securities, or possessing or selling such impressions (18 U.S.C. 476, 477); possessing, using, or selling materials (such as plates, stones and paper) that can be used for counterfeiting purposes (18 U.S.C. 474 ¶¶ 1-5, 7); and using imitations of United States obligations or securities for advertising purposes (18 U.S.C. 475).

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[1] In contrast to the Articles of Confederation, which only empowered the federal government to regulate "the alloy and value of coin struck by their own authority or by that of the respective States" (Articles of Confederation, Art. IX), the Constitution gives the federal government a monopoly on coinage by expressly prohibiting the states from coining money (Art. I, § 10, Cl. 3). The constitutional grant to Congress of exclusive authority to coin money and punish counterfeiting was a response to numerous problems over commerce and coinage under the Articles of Confederation. See A. Sutherland, *Constitutionalism in America* 162-166 (1965). James Madison stated that these constitutional provisions "supplied a material omission in the [A]rticles of Confederation." *The Federalist* No. 42, at 216 (E. Rhys ed. 1942). In 1792, Congress exercised its exclusive authority over coinage by establishing a mint and creating a standard of notation that defined the dollar unit and introduced the decimal pattern of calculation. Act of Apr. 2, 1792, ch. 16, 1 Stat. 246 *et seq.*

In addition to the foregoing provisions, Chapter 25 contains the two statutes at issue in this case. The first statute, 18 U.S.C. 474 ¶ 6, broadly prohibits printing, photographing, or making any impression in the likeness of any obligation or other security of the United States.[2] The second statute, 18 U.S.C. 504(1), creates certain exceptions to the broad prohibition in Section 474 ¶ 6. Section 504(1) permits the printing or publishing of illustrations of United States obligations and securities "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums," provided that the illustrations are in black and white and are of a size less than three-quarters or more than one-and-one-half of the genuine article, and provided further that the negatives and plates used in making the illustrations are destroyed after their final use.

1. 18 U.S.C. 474 ¶ 6

Section 474 ¶ 6 punishes any person who in any manner makes or executes "any engraving, photograph, print, or impression in the likeness of any * * * obligation or other security [of the United States] * * *." Unlike most of the other provisions in Chapter 25, Section 474 ¶ 6 does not require a showing of specific intent to defraud, and the courts have consistently interpreted this provision as prohibiting reproductions of United States currency without regard to whether the reproductions are

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[2] The term "obligation or other security of the United States" is defined in 18 U.S.C. 8 as including

> all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value of whatever denomination, issued under any Act of Congress, and canceled United States stamps.

either accurate likenesses of genuine obligations, or are intended to or are capable of deceiving the public.[3] Section 474 ¶ 6 thus reflects Congress' determination to permit no unauthorized reproductions of United States currency.

Section 474 ¶ 6 dates from the period of the War Between the States (see J.A. 122-123). Earlier, in 1790, Congress enacted the Nation's first anti-counterfeiting statute, which made it a crime to counterfeit or utter certificates, indents, or other public securities of the United States. Act of Apr. 30, 1790, ch. 9, Section 14, 1 Stat. 115. In 1837, Congress authorized the issuance of a theretofore unprecedented amount of Treasury notes and expanded the scope of the anti-counterfeiting laws by punishing the possession of any plate, bank note, or paper adapted for counterfeiting purposes. Act of Oct. 12, 1837, ch. 2, Sections 10, 11, 5 Stat. 203. See *United States* v. *Raynor*, 302 U.S. 540, 543-544 (1938). Between 1860 and 1864, Congress authorized great increases in government obligations, a development that stimulated counterfeiting and increased the need to enact stricter legislation to deal with the problem. See *id.* at 544-545. In 1862, Congress first made it a crime to "print, photograph, or in any other manner execute" an impression "in the likeness or similitude of any [United States] notes, bonds or coupons, or other securities * * *." Act of Feb. 25, 1862, ch. 33, Sections 6, 7, 12 Stat. 348. Two years later, Congress broadened the prohibition to include the making of prints or photographs "in the likeness or similitude of any obligation or other security" of the United States. Act of June 30, 1864, ch. 172, Sec-

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[3] See *Webb* v. *United States*, 216 F.2d 151, 152 (6th Cir. 1954); *Wholesale Vendors of Texas, Inc.* v. *United States*, 361 F. Supp. 1045, 1047-1048 (N.D. Tex.), aff'd, 486 F.2d 1402 (5th Cir. 1973); cf. *Koran* v. *United States*, 408 F.2d 1321, 1325 n.12 (5th Cir. 1969), cert. denied, 402 U.S. 948 (1971).

tion 11, 13 Stat. 221-222.[4] The statute has continued, in substantially the same form, until today.[5]

2. 18 U.S.C. 504(1)

Section 504, which provides certain exceptions to the flat ban of Section 474 ¶ 6, was enacted in 1958. The purpose of this statute was explained in identical language in the House and Senate Committee Reports:

> Title 18, United States Code, section 474, as previously stated, prohibits making any photograph, engraving, print, or impression in the likeness of any obligation or security. * * *
>
> The Treasury Department receives numerous requests for special permission to use illustrations of paper money and other obligations and securities of the United States for various legitimate purposes. Publishers of textbooks often desire to use illustrations of United States savings bonds and postal money orders, for example, in school textbooks. Collectors of old paper money likewise wish to use illustrations of such money in articles relating to their issue and in collector's catalogs. Historians similarly want to use illustrations of paper money

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[4] Section 11 of the 1864 Act is set forth in the district court's opinion (J.A. 122-123). Section 13 of that Act (13 Stat. 222) defined "obligation or other security" as including "all bonds, coupons, national currency, United States notes, treasury notes, fractional notes * * * of whatever denomination, which have been or may be issued under any Act of Congress."

[5] The statute was reenacted, with few changes, as Section 5430 of the Revised Statutes of 1878, and again as Section 150 of the codification of 1909. Act of Mar. 4, 1909, ch. 319, 35 Stat. 1116. At that time, a Special Joint Congressional Committee on Revision of the Laws noted:

> This section [what is now 18 U.S.C. 474] is broadened as to embrace every method which may be employed in counterfeiting the obligations of the United States * * *.

S. Rep. No. 10 (Pt. 1), 60th Cong., 1st Sess. 19 (1909). The statute was amended again in 1923 to authorize certain illustrations of postage and revenue stamps. Act of Mar. 3, 1923, ch. 218, 42 Stat. 1437.

to picture currency in circulation during a particular historical period. Newspapers quite often publish pictures of paper money or checks in connection with news articles, usually because of ignorance of the statutory prohibitions against the use of such illustrations.

The Secretary of the Treasury, under the authority vested in him by title 18, United States Code, section 474, has normally as a matter of practice for many years made exceptions to the statute by granting special permission to use illustrations of United States bonds and paper money for numismatic, historical, and educational purposes. To prevent any possibility of the illustrations being used as an instrument of fraud, such special permission has been limited to the use of black-and-white illustrations less than three-fourths or more than 1½ times the size of the genuine paper money.

It is the opinion of the Treasury Department that the printing in publications of black-and-white illustrations of paper money and other obligations and securities of the United States restricted in size will not facilitate counterfeiting. Paragraph (1) of section 504 of the United States Code, as it would be amended by the bill, will specifically permit such illustrations for numismatic, educational, historical, and newsworthy purposes and will obviate the necessity of obtaining special permission from the Secretary of the Treasury in each case where the use of such illustrations is desired. A provision is included to require that the negatives and plates used in making the illustrations shall be destroyed after their final use for the purpose for which they were made. Such a requirement has formerly been imposed in cases where the Secretary of the Treasury has granted special permission as a precautionary measure and to avoid investigations of alleged violation where plates and negatives were legitimately made but were merely discarded instead of being destroyed.

The instant legislation will not permit the printing of facsimiles in the likeness of paper money or

> other obligations, but would limit reproductions to illustrations in publications. * * *

S. Rep. No. 2446, 85th Cong., 2d Sess. 5-6 (1958); H.R. Rep. No. 1709, 85th Cong., 2d Sess. 3-4 (1958).

Thus, as the district court noted (J.A. 125), in Section 504(1) Congress codified the Secretary of the Treasury's practice of permitting illustrations of United States currency to be used for numismatic, historical and educational purposes. In order to prevent fraud and counterfeiting, the statute imposes certain minimal requirements: illustrations must be in black and white and must be of a certain size, and negatives and plates used to make such illustrations must be destroyed. Finally, Congress emphasized that Section 504(1) limits reproductions to illustrations in publications and does not permit the printing of facsimiles.[6]

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[6] 18 U.S.C. 504(2) permits the use of United States obligations and securities in motion-picture films, microfilms or slides for projection on a screen and in telecasting. The Committee reports explained:

> The use of films by individuals and by private industry for various purposes has expanded steadily over the years and the Treasury Department perceives no difficulty, from the standpoint of preventing counterfeiting, in permitting the making of motion-picture films, micro-films, or slides of various obligations and securities of the United States and foreign governments. Paragraph (2) of section 504, as it would be amended by the bill, would provide statutory authority for making such films. The counterfeiter does not use a motion-picture film, microfilm, or slide in the preparation of counterfeits and it is felt that to permit such films would not facilitate counterfeiting. As a precaution, however, a provision is included to the effect that no prints or enlargements could be made from the films without special permission of the Secretary of the Treasury.

S. Rep. No. 2446, *supra*, at 7; H.R. Rep. No. 1709, *supra*, at 5.

Section 504(2) does provide that films, microfilms or slides showing United States currency may not be made for advertising purposes (except philatelic advertising). Section 504(1) has a similar provision. In addition, 18 U.S.C. 475 independently prohibits the making or distribution of any advertisement "in the likeness or

B. The Proceedings Below

1. Appellee Time, Inc., a corporation engaged in the business of publishing magazines, brought this action for declaratory and injunctive relief in the United States District Court for the Southern District of New York, challenging the constitutionality of 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504(1) on their face and as applied (J.A. 3-12).[7] Appellee alleged that, on at least six occasions within the preceding decade, representatives of the Secret Service had advised appellee that particular photographic reproductions of United States currency that appeared in appellee's magazines were in violation of the color and size requirements of Section 504(1) (J.A. 10, 30-35). Appellee further alleged that the Secret Service had requested it to cease and desist from further violations and had warned, in November 1976, that further violations would be referred to the United States Attorney's Office "for appropriate action" (J.A. 34-35).[8]

Appellee asserted that, "[i]n the editorial judgment of [its] editors and art directors," illustrations of currency are an effective means of communicating ideas about a wide range of issues of public interest and "[f]reedom to use such illustrations is important to the journalists responsible for the selection and preparation of the editorial content of [appellee's] magazines" (J.A.

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similitude" of any United States obligation or security. Appellee has not challenged the restrictions imposed upon advertisers, and thus these provisions are not at issue in this case.

[7] The complaint named as defendants certain government officials responsible for administering and enforcing the federal anti-counterfeiting laws, including the Secretary of the Treasury, the Attorney General, the Director of the Secret Service, the United States Attorney for the Southern District of New York and the Special Agent in Charge of the Secret Service's New York Field Office (J.A. 4-5).

[8] Although the Secret Service subsequently brought additional alleged violations to appellee's attention, none of these matters was formally referred to the United States Attorney's Office for prosecution.

5).[9] Appellee contended that Section 474 ¶ 6 and 504(1) violate the First Amendment because they prohibit the publication of illustrations of currency that pose no danger to the government's interest in preventing counterfeiting, and because Section 504(1) impermissibly distinguishes lawful from unlawful speech on the basis of content. In addition, appellee claimed that Section 504(1) is unconstitutionally vague (J.A. 10-11).[10]

2. On cross-motions for summary judgment, the district court entered a declaratory judgment for appellee, holding that 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504 are unconstitutional on their face and as applied to appellee (J.A. 117-153, 155-156).[11] The court first concluded that

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[9] Appellee submitted affidavits by editors and art directors of several of its magazines to explain the journalistic value of color illustrations of currency (J.A. 71-103). The affidavits stated that appellee's magazines increasingly have relied on color photographs to accompany their texts (J.A. 77, 91-92) and that, because the statutes at issue prohibit color depictions of currency, they amount to "government censorship" (J.A. 93) and "severely restrict [appellee's] ability to communicate on issues of great contemporary importance" (J.A. 79). The affidavits alleged that the ban on color illustrations of currency is not a rational means of preventing counterfeiting because technological advances have made it unnecessary for a would-be counterfeiter to resort to copying illustrations of currency in appellee's magazines, and because the illustrations published by appellee generally involved distorted representations of currency in the wrong size, color and shape (J.A. 76, 89, 92, 98-99).

[10] Appellee stated that it has no objection to the requirement in Section 504(1) that materials used to print illustrations of currency be destroyed after their final use (J.A. 76-77).

[11] The district court rejected the argument that appellee's challenge to the constitutionality of the statutes did not present a justiciable controversy sufficient to support federal court jurisdiction under Article III (J.A. 133-137). The court noted that over a ten year period the Secret Service had issued warnings to appellee that appellee's illustrations were in violation of the statutes, and it observed that federal officials had "never disavowed the possibility of prosecution" (J.A. 136-137). In these circumstances, the court concluded that even though appellee had not actually been prosecuted under

appellee's publication of illustrations of United States currency is protected speech because it is "intimately related to the expression and communication of ideas" and "does not entail expression which is deemed by the nature of its content to be subject to regulation in the interests of the public weal" (J.A. 138-139).

Focusing on Section 474 ¶6, the district court ruled that, although "[t]he government has a compelling interest in preventing counterfeiting and thus maintaining the integrity of the nation's currency system" (J.A. 145-146), the comprehensive ban on reproducing likenesses of United States currency constitutes overbroad subject matter regulation that interferes unduly with protected speech because it includes within its prohibition illustrations of currency "that have no utility for fraud or forgery and that cannot be used for counterfeiting" (J.A. 146). The court concluded (*ibid.*), without elaboration, that "[t]here are less intrusive ways to combat counterfeiting without totally removing illustrations of money from the national discourse." In addition, the district court rejected the argument that the prohibition in Section 474 ¶ 6 could be justified on the ground that it protects " 'the value [of] and respect for instruments issued as the official obligations of the United States' " (J.A. 145). The court viewed this justification as banning "the use of illustrations of money because of the ideas such illustrations may symbolically represent" (J.A. 146-147), and concluded that the justification was impermissible because "[t]he government cannot compel or prohibit respect for any symbol or idea in this country" (J.A. 147).

The district court then turned to Section 504(1), which it interpreted as excepting from the broad prohibition in Section 474 ¶ 6 black and white illustrations that meet certain size specifications only if those illustrations appear in articles, books, journals, newspapers or albums for

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the statutes, the controversy was sufficiently concrete to satisfy the requirements of Article III.

philatelic, numismatic, educational, historical, or newsworthy purposes (J.A. 149). The court determined that this statute effects a "time, place and manner" regulation that is impermissibly content-based because "[n]either the purpose to which an illustration is put nor the forum in which it appears has any relation to the prevention of counterfeiting" (J.A. 150). In addition, the court held Section 504(1) impermissibly vague because, it found, an individual would have difficulty determining what is a journal, newspaper or album, and what purposes are philatelic, numismatic, educational, historical, or newsworthy (J.A. 151-152).[12]

SUMMARY OF ARGUMENT

Section 474 ¶ 6 and 504(1) are presumptively valid Acts of Congress, plainly authorized by the powers delegated in Article I, Section 8 of the Constitution to coin money, regulate the currency and punish counterfeiting, and to make all laws "necessary and proper" for those purposes. The district court erred in concluding that these statutes are unconstitutional. The statutes do not significantly restrict First Amendment rights and are necessary to further the government's compelling interest in protecting the integrity of the Nation's currency system.

A. Contrary to appellee's contentions, Section 474 ¶ 6, which prohibits the reproduction of photographs of United States currency, does not meaningfully abridge appellee's freedom to communicate on any subject. The statute is directed only at the use of illustrations of United States currency, not at the substance of any message appellee wishes to convey.

Moreover, the minimal limitation on expression contained in Section 474 ¶ 6 is justified by the government's compelling interest in preserving the integrity of its cur-

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[12] In light of its entry of a declaratory judgment holding Sections 474 ¶ 6 and 504 unconstitutional, the district court concluded that there was no need to enjoin appellants from enforcing the statutes (J.A. 153 n.24).

rency system. That interest includes not only the need to punish and deter counterfeiters, which both the district court and appellee recognize as a legitimate governmental objective, but also the need to detect and investigate counterfeiting activity, which by its nature is carried out surreptitiously. Because the process of printing, photographing, or making an impression of United States currency for legitimate expressive purposes is virtually indistinguishable from the processes involved in counterfeiting currency, the prohibition in Section 474 ¶ 6 enables the Secret Service to trace and identify the sources of counterfeit bills.

In addition, the government's interest in preserving the integrity of its currency system extends beyond a concern with counterfeiting. Like laws that regulate the uses of the flag, Section 474 ¶ 6 may properly be viewed as a restriction on the uses to which the government's "property" may be put. See *Smith* v. *Goguen*, 415 U.S. 566, 586-587 (1974) (White, J., concurring in the judgment). The design and appearance of United States obligations and securities are as much the "property" of the government—and are equally subject to reasonable restrictions on expression designed to protect their integrity—as were the military base in *Greer* v. *Spock*, 424 U.S. 828 (1976), the transit system vehicles in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), or the letterboxes in *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981). The district court erred in concluding that this was an impermissible justification because it, in effect, would require publishers to pay "respect" to the government's symbol. Section 474 ¶ 6 does not require anyone to respect United States currency, or ban the use of illustrations of currency because of the ideas those illustrations may represent. Rather, the statute simply prohibits the printing or photographing of currency, without regard to the message sought to be conveyed.

B. Section 504(1) permits publishers to include illustrations of United States currency in publications,

provided that the illustrations are in black and white and are of a certain size, and provided further that the plates or negatives used in making the illustrations are destroyed. These limitations also are not directed at the idea that an illustration of currency is intended to convey, but merely affect the manner in which an illustration of a dollar bill may be presented. Thus, Section 504(1) may be upheld as a content-neutral time, place and manner regulation.

The district court concluded, however, that Section 504(1) is not a proper time, place and manner regulation because, in permitting the publication of illustrations of United States currency for "philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers or albums," the statute regulates speech on the basis of content. The court also found that the "forum" and "purpose" provisions are invalid because there is an insufficient nexus between the distinctions among the various purposes and forums and the goal of preventing fraud and counterfeiting. In addition, the court concluded that the 'purpose" and "forum" provisions are impermissibly vague.

The district court erred in striking down the statute without attempting to interpret it more narrowly in order to alleviate the constitutional problems it discerned. In Section 504(1), Congress merely sought to codify the Department of the Treasury's informal practice of permitting publishers of books, journals and newspapers to use illustrations of currency for numismatic, historical, educational, or newsworthy purposes. Thus, the statutory references to these "purposes" and "forums" may be construed as illustrative rather than mandatory. So construed, the statute does not suffer from any of the constitutional defects that the district court perceived.

Contrary to appellee's view, the statutory prohibition of color illustrations of currency is not "irrational." In effect, appellee is seeking to elevate its editors' aesthetic preference for color illustrations of currency to a constitutionally protected "right" to freedom of expression.

Congress reasonably concluded, however, based on the recommendations of the Department of the Treasury, that this limitation (as well as the limitations as to size and disposition of negatives and plates) was necessary to protect against counterfeiting and fraud. The fact that technological advances in color reproduction have caused magazine publishers like appellee to rely to an increasingly greater extent on color photographs does not justify the conclusion that the statute is constitutionally infirm. Indeed, these advances in technology have also helped to facilitate the work of counterfeiters while making detection and enforcement more difficult.

Finally, if this Court were to conclude that Section 504(1) cannot be saved by judicial construction, it should sever the two statutes and invalidate Section 504(1) while leaving intact Section 474 ¶ 6, which was enacted nearly a century earlier.

ARGUMENT

18 U.S.C. 474 ¶ 6 AND 18 U.S.C. 504(1) ARE CONSTITUTIONAL BECAUSE THEY ARE REASONABLE MEASURES DESIGNED TO SAFEGUARD THE NATION'S CURRENCY SYSTEM AGAINST COUNTERFEITING

A. Introduction

The Framers of the Constitution recognized that the power to establish a monetary system is an essential attribute of national sovereignty. A concomitant of that power is the authority to preserve and maintain the integrity of the Nation's monetary system. See *United States* v. *Marigold*, 50 U.S. (9 How.) 560 (1850). As this Court has recognized, "currency measures all values and is the medium, directly or indirectly, of all exchanges. To keep it sound, and to guard it as far as possible from fluctuation, are among the most imperative duties and among the most difficult problems of government." *Davidson* v. *Lanier*, 71 U.S. (4 Wall.) 447, 454 (1867). Article I, Section 8 of the Constitution accordingly grants to Con-

gress exclusive authority to coin money, regulate the value of currency and punish counterfeiting, and to "make all Laws which shall be necessary and proper" for executing those tasks. Congress has exercised these powers to restrict the reproduction of photographs of United States currency. Neither the district court nor appellee has suggested that 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504(1) exceed Congress' Article I powers.[13] We begin, then, with two presumptively valid federal statutes—one unchallenged for more than 100 years, the other enacted in recent times to accommodate expressive concerns—both of which are clearly within the powers delegated to the Legislative Branch by the Constitution.

Appellee asserts, however, that the statutory scheme violates its First Amendment right to freedom of expression. This Court has recognized that First Amendment rights are not absolute under all circumstances. They may be circumscribed when necessary to further a sufficiently strong public interest. See, *e.g.*, *New York* v. *Ferber*, No. 81-55 (July 2, 1982); *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978); *Pell* v. *Procunier*, 417 U.S. 817 (1974). At the same time, the Court's decisions emphasize that any significant restriction of First Amendment freedoms carries a heavy burden of justification. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 64-65 (1976); *Grayned* v. *City of Rockford*, 408 U.S. 104, 116-117 (1972). It is our basic submission that the statutes involved in this case do not significantly restrict First Amendment rights and, in any event, are necessary to further a compelling governmental interest.

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[13] This Court has frequently sanctioned an expansive view of Congress' powers over the monetary system. See *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533 (1869) (upholding prohibitory tax on state bank notes); *Knox* v. *Lee*, 79 U.S. (12 Wall.) 457 (1871) (upholding authority of Congress to make paper money legal tender); *Beander* v. *Barnett*, 255 U.S. 224 (1921) and *United States* v. *Raynor*, 302 U.S. 540 (1938) (prohibiting possession of dies and paper similar to those used by the government for printing federal obligations).

In order to appreciate fully the extreme nature of appellee's First Amendment claims, it is necessary to view the statutes in tandem, which is how Congress meant them to operate. Section 474 ¶ 6 absolutely prohibits the printing or photographing of currency, but Section 504(1) creates a broad exception to that prohibition by permitting the use of illustrations of currency in publications so long as the illustrations meet the color and size requirements of the statute and the plates and negative used in printing the illustrations are destroyed. In other words, the statutory scheme merely prohibits a magazine publisher such as appellee from publishing photographs of United States currency in color or in dimensions that approximate the size of the actual currency depicted. These narrow restrictions are not directed at the content of any particular message a publisher may seek to convey by means of the photograph, but instead regulate only the manner or style in which publishers may illustrate United States currency. Under the statutory scheme, therefore, appellee is free to publish photographs of currency in its magazines for expressive purposes, so long as those photographs are in compliance with reasonable limitations designed to serve the government's concededly compelling interest of protecting against counterfeiting.

It is difficult to believe that whatever ideas appellee wishes to communicate by means of illustrations of currency cannot be conveyed by illustrations that comply with the statutory color and size requirements. Thus, when appellee's First Amendment claim is scrutinized closely, it is quite apparent that appellee has no legitimate complaint that the statutes meaningfully curtail its "freedom of expression." Instead, appellee is seeking to elevate its editors' aesthetic preference for color photographs of currency to a constitutionally protected "right".

Appellee's argument boils down to the proposition that the First Amendment guarantees it the right to publish photographs depicting currency in whatever color and size it chooses. In support of this argument appellee asserts that the color and size requirements are unnecessary to

protect against counterfeiting. But the task of selecting the measures necessary to preserve the integrity of our currency system is one that the Constitution has entrusted to Congress, not the courts. Congress, in its wisdom, has decided that the measures it has selected are indeed necessary to protect against counterfeiting. As we show below, the statutory requirements are reasonably related to accomplishing that legitimate purpose. Moreover, to the extent that appellee argues that the lines drawn by Section 504(1) are irrational, appellee appears to raise a question of substantive due process rather than a question of First Amendment law. Regardless of how appellee's arguments may be characterized, however, they are without merit.

In short, despite appellee's grossly exaggerated portrayal of this case as involving "government censorship" of the press (J.A. 93), the statutory scheme represents Congress' effort to strike a reasonable balance between legitimate First Amendment concerns and legitimate law enforcement concerns. Appellee's arguments reflect an extreme approach that, if accepted, would result in the trivialization of the First Amendment and the important values it embodies. Given the presumption in favor of constitutionality, the concededly compelling government interest involved, and the minimal and reasonable restrictions imposed by the statutory scheme, we submit that the district court erred in striking that scheme down.

B. Section 474 ¶ 6 Is Not Impermissibly Overbroad

Instead of considering Section 474 ¶ 6 together with Section 504(1), the statute that was expressly designed to modify it, the district court analyzed Section 474 ¶ 6 in isolation and concluded that it is unconstitutionally overbroad. This was error. In considering the constitutionality of a statute, it is necessary at the outset to determine the statute's scope. As in cases involving statutory construction, "a section of a statute should not be read in isolation from the context of the whole Act." *Richards* v. *United States*, 369 U.S. 1, 11 (1962). See,

e.g., *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974). Even when viewed standing alone, however, Section 474 ¶ 6 passes constitutional muster.

Section 474 ¶ 6 prohibits the printing, photographing, or making of any impression in the likeness of an obligation or security of the United States.[14] Appellee asserts (Mot. to Aff. 10, 21) that this statute, "[w]hile not 'aimed' at speech, * * * directly and dramatically abridges the freedom to communicate" and "significantly restricts the editorial content of [appellee's] magazines." This extravagant claim is surely incorrect. Section 474 ¶ 6 does not implicate the central concern of the First Amendment, which is the restriction of expression because of the message it conveys. The statute does not inhibit appellee or anyone else from expressing any view on any subject. The statute is directed only at the use of illustrations of United States currency, not at the substance of any message appellee wishes to convey. Thus, this is not a situation in which the government has arrogated to itself "the choice of permissible subjects for public debate." *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 538 (1980). So long as the minimal requirement of Section 474 ¶ 6 is met, appellee and all others remain free "to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940) (footnote omitted).

Moreover, the minimal limitation on expression contained in Section 474 ¶ 6 is justified by the compelling governmental interest in preserving the integrity of the Nation's currency system. One aspect of that interest is the need to protect against counterfeiting, a concern that

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[14] The prohibition embodied in this statute is similar to prohibitions in other federal criminal statutes relating to photographing or printing immigration or naturalization documents (18 U.S.C. 1426 and 1546), government transportation requests (18 U.S.C. 509), and government identification documents (18 U.S.C. 701).

both appellee and the district court have conceded is compelling. The district court held (J.A. 145-146), however, that by prohibiting *all* illustrations of currency—including illustrations that are not likely to deceive or to assist counterfeiters—the statute is not tailored with sufficient precision to serve that concededly compelling interest.

The district court's analysis is flawed. Section 474 ¶ 6 is designed not only to punish and thereby deter counterfeiting (as are the other provisions of Chapter 25), but also to facilitate the government's efforts at *detecting* and *investigating* counterfeiting activity. Cf. *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 117-118 (1981). By its nature, counterfeiting is a crime that is committed surreptitiously and that depends for its success on the ability of the perpetrators to camouflage their illicit operation. A statute that prohibits the printing of United States currency enables the Secret Service to operate more effectively in tracing and identifying the source of counterfeit bills. The minimal restriction on speech in Section 474 ¶ 6 is certainly a reasonable means for achieving that legitimate goal. If the ban in Section 474 ¶ 6 were eliminated altogether, counterfeiters would more readily be able to conceal their criminal conduct by associating with legitimate print shops, thereby availing themselves of an instant alibi for manufacturing and possessing currency negatives (see J.S. App. 41a-43a).[15]

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[15] This point is supported by recent statistics concerning counterfeiting activity in the United States. The Secret Service has reported that in Fiscal Year 1982, more than 273,000 counterfeit notes valued at nearly $8,586,000 were passed, and over 1,484,000 notes valued at approximately $73,681,000 were seized prior to circulation. During this same period, government investigators uncovered only 86 counterfeiting plants throughout the country. Department of the Treasury, United States Secret Service, *Annual Statistical Summary FY 82*, at 2 (1982). By prohibiting the making of unauthorized impressions of United States currency, Section 474 ¶ 6 permits Secret Service investigators to assume that anyone in possession of negatives or prints of United States currency may

Appellee contends (Mot. to Aff. 88, 23-24) that the conduct prohibited by the statute involves "pure speech" and that, accordingly, the government has a heavier burden of justification than in the case of statutes involving conduct that combines "speech" and "nonspeech" elements. But the process of printing, photographing, or making an impression of United States currency involves a substantial amount of "nonspeech" conduct. In fact, this "nonspeech" conduct is, in many respects, indistinguishable from the conduct of counterfeiters, who clearly do not enjoy First Amendment protection for their illegal activities. (Most counterfeiters use the photo-offset process, which is the same process used to print most magazines (see J.S. App. 41a).) That is precisely why Section 474 ¶ 6 should be upheld as necessary to assist in the investigation and detection of counterfeiting.

Furthermore, the government's interest in preserving the integrity of the monetary system of the United States extends beyond a concern with counterfeiting. In a very real sense, the design and appearance of United States obligations and securities are the "property" of the government. The words of Justice White, concurring in the judgment in *Smith* v. *Goguen*, 415 U.S. 566, 586-587 (1974), are at least as apropos to laws—such as Section 474 ¶ 6—designed to protect the integrity of the Nation's currency as to laws regulating the use of the national flag of which he spoke:

> There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. Congress may provide for the general welfare, control interstate commerce, provide for the

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be engaged in illegal counterfeiting activity. Given the large number of counterfeit notes passed and seized each year as compared to the relatively small number of counterfeit plants uncovered, it is reasonable to conclude that effective enforcement of the anti-counterfeiting laws would be significantly frustrated if there were no statutory restrictions on the printing or photographing of United States securities and obligations or if all such restrictions depended upon proof of criminal intent. See pages 34-35, *infra*.

> common defense, and exercise any powers necessary and proper for those ends. These powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag. It would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation, Act of Jan. 13, 1794, 1 Stat. 341, c.1, just as they had for the Union under the Articles of Confederation. 8 Journals of the Continental Congress 464 (June 14, 1777). It is a fact of history that flags have been associated with nations and with government at all levels, as well as with tribes and families. It is also a historical fact that flags, including ours, have played an important and useful role in human affairs. One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition. The United States has created its own flag, as it may. The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it.

In contrast to the flag, which serves only as a symbol of "nationhood and unity," the obligations and securities of the United States, which include Federal Reserve notes, Treasury bonds and notes, certificates of deposit, checks and drafts (see 18 U.S.C. 8), are the lifeblood of the Nation's commercial and economic existence. See *Davidson* v. *Lanier*, *supra*, 71 U.S. (4 Wall.) at 454 ("currency measures all values and is the medium, directly or indirectly, of all exchanges"). By the same token, like laws that regulate the use of the flag, Section 474 ¶ 6 may properly be viewed as simply restricting the uses to which the government's "property" may be put. In this respect, the instant case is analogous to this Court's decisions in *Greer* v. *Spock*, 424 U.S. 828 (1976),

and *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), in which the Court "recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated." *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 538.

The district court purported to distinguish *Greer* and *Lehman* on the ground that "[t]his case does not concern the availability of a public facility for the exercise of the free speech right by private parties. [Appellee] does not seek to use the United States Courthouse in Foley Square as a facility from which to propound its views" (J.A. 145). But the design and appearance of United States obligations and securities are as much the "property" of the government—and are equally subject to reasonable restrictions on expression designed to protect their integrity—as were the military base in *Greer* and the transit system vehicles in *Lehman*, or, for that matter, the jail in *Adderley* v. *Florida*, 385 U.S. 39 (1966), and the letterboxes in *United States Postal Service* v. *Council of Greenburgh Civic Associations*, *supra*.[16]

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[16] To be sure, unlike *Greer* and the other cases cited, this case does not involve "a debate over the dimensions of the concept of the 'public forum'" (Mot. to Aff. 23; footnote omitted). We submit, however, that these cases nevertheless are instructive because they suggest that the governmental interest in preserving its "property" for the uses to which it was dedicated may outweigh an individual's interest in using that property for his own expressive purposes. The problem with the approach of both the district court and appellee is that this case does not fit neatly into precast, textbook categories. Thus, appellee takes us to task (Mot. to Aff. 23 n.16) for suggesting that Section 474 ¶ 6 is, in effect, a "copyright" statute. The point of that suggestion (see J.S. 11 n.7), though, was simply to demonstrate that the statute may be compared to copyright laws in the sense that it limits the uses to which United States obligations and securities may be put.

Indeed, we note that appellee recently asserted the right to regulate a political candidate's use of a red border design in a campaign leaflet, on the ground that the design is protected, through trademark registration. See N.Y. Times, May 14, 1983, at 8, col. 1. In contrast to trademark protections, however, Section 474 ¶ 6 is con-

Appellee asserts (Mot. to Aff. 23 n.16), and the district court concluded (J.A. 146-147), that the statute may not be justified as protecting the integrity of the government's "property" because this, in effect, would require appellee to pay "homage" to the government's symbol. However, Section 474 ¶ 6 does not require appellee or anyone else to respect United States currency; it simply prohibits the printing and photographing of such currency. Nor does the statute "ban[] the use of illustrations of money because of the ideas such illustrations may symbolically represent" (J.A. 146-147); instead, the statutory prohibition applies across-the-board to all illustrations of currency, with complete indifference to the particular message sought to be conveyed by means of the illustration.

C. Section 504(1) Does Not Regulate Speech On The Basis Of Content Or Subject Matter, And Is Not Impermissibly Vague

As the foregoing discussion demonstrates, the prohibition in 18 U.S.C. 474 ¶ 6 on printing and photographing United States currency is permissible under the First Amendment because it does not significantly restrict protected expression and it is justified by a compelling governmental interest. Any doubt as to the constitutionality of Section 474 ¶ 6 is dispelled by Section 504(1), which creates a substantial exception to the prohibition in the former statute in order to accommodate expressive activities.

1. Section 504(1) permits publishers to include illustrations of United States currency in publications, provided that the illustrations are in black and white and are of a certain size, and provided further that the plates or negatives used in making the illustrations are destroyed. In its informed judgment, and based on the

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cerned, not with the property interests of private parties, but with the fundamental societal interest of preserving the integrity of the Nation's currency system.

recommendations of the Department of the Treasury, Congress deemed these limitations necessary in order to ensure that illustrations of currency would not facilitate counterfeiting or be used for fraudulent purposes. See pages 7-9, *supra*. Thus, Section 504(1) reflects Congress' careful attempt to balance legitimate First Amendment concerns and legitimate law enforcement concerns by permitting reproduction of photographs of currency so long as certain reasonable conditions—designed to protect against fraudulent use of those photographs—are satisfied. That congressional judgment is entitled to considerable respect. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973).

The limitations contained in Section 504(1) are content-neutral. They are not directed at the nature or quality of the idea that an illustration of currency is intended to convey. Instead, the limitations merely affect the manner in which an illustration of a dollar bill may be presented. Thus, the statute may be viewed as a reasonable time, place and manner regulation that is " 'justified without reference to the content of the regulated speech, that * * * serve[s] a significant governmental interest, and that * * * leave[s] open ample alternative channels for communication * * *.' " *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

2. The district court concluded, however, that Section 504(1) is not a proper time, place and manner regulation because in permitting the publication of illustrations of United States currency "for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers or albums," the statute regulates speech on the basis of content or subject matter (J.A. 149). In addition, the court found that the "purpose" and "forum" provisions of Section 504(1) are impermissible because there is an insufficient nexus between the

distinctions among the various purposes and forums, on the one hand, and the statutory goal of preventing fraud and counterfeiting, on the other (J.A. 150-151). Finally, the court held that the "purpose" and "forum" provisions are impermissibly vague because they do not clearly delineate the area of forbidden conduct (J.A. 151-152).

The constitutional problems that the district court discerned with respect to Section 504(1) all stem from the court's construction of the "purpose" and "forum" provisions as constituting absolute statutory conditions that must be met before an illustration of currency will be deemed lawful. But the court below erred in striking down the statute without attempting either to clarify its meaning or to interpret it more narrowly in order to alleviate the problems it discerned. It is well settled that "[w]hen a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *New York* v. *Ferber*, *supra*, slip op. 22 n.24; see *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Schneider* v. *Smith*, 390 U.S. 17, 26-27 (1968); *United States* v. *Rumley*, 345 U.S. 41, 45 (1953).[17] Moreover, the Court will not reject a construction that saves a statute from unconstitutionality merely because another construction is arguably more consistent with Congress' intentions; "an Act of Congress ought not be construed to violate the Constitution if any other *possible* construction remains available." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979) (emphasis added). See, *e.g.*, *Pernell* v. *Southall Realty*, 416 U.S. 363, 365 (1974); *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974).

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[17] As the Court noted in *Schneider* v. *Smith*, *supra*, 390 U.S. at 26, this rule is a corollary of the general doctrine that the courts should construe statutes so as to avoid constitutional questions. See, *e.g.*, *United States* v. *Clark*, 445 U.S. 23, 27 (1980); *Rosenberg* v. *Fleuti*, 374 U.S. 449, 451 (1963); *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

Section 504(1) clearly is susceptible of such a limiting construction. The legislative record does not support the view that Congress intended officials of the Executive Branch to enforce the statute based on the content of the stories accompanying an illustration of currency. Rather, as the district court itself pointed out (J.A. 125), Congress merely sought in Section 504(1) to institutionalize the Department of the Treasury's settled practice of permitting publishers of books, journals and newspapers to use illustrations of currency for numismatic, historical, educational, or newsworthy purposes. Thus, the reference in the statute to these various "purposes" and "forums" may be construed as descriptive and illustrative, rather than prescriptive and mandatory.[18] The legislative history makes clear that the overriding congressional objective in enacting the statute was simply to permit the use of illustrations of currency "in publications," in order to accommodate expressive interests and minimize the intrusion on First Amendment values, while at the same time continuing to prohibit "the printing of facsimiles in the likeness of paper money or other obligations * * *." S. Rep. No. 2446, *supra*, at 6; H.R. Rep. No. 1709, *supra*, at 4. So construed, the statute does not suffer from any of the constitutional defects that the district court perceived.

Appellee contends (Mot. to Aff. 27) that this proposed construction would not save the statute because it is un-

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[18] In the past, the Department of the Treasury apparently has taken the position that Section 504(1) prohibits illustrations used primarily for "decorative" or "eye-catching" purposes, and that illustrations must be accompanied by information relating to the particular item illustrated (see J.A. 49, 62, 107, 133 & n.9). We are informed, however, that the Department no longer adheres to this interpretation, and that the Secret Service has requested that the pamphlet entitled, *Use Of Illustrations Of Obligations & Securities Of The United States & Foreign Governments* be amended to delete any reference to this interpretation (see J.A. 62). In view of this change of position, there is no need for this Court to consider how, if at all, the Department's former position might have affected the Court's consideration of the constitutionality of the statutes.

reasonable to "confin[e] permitted pictures to 'publications.'" In its complaint, however, appellee did not even challenge the "forum" provision of the statute (see J.A. 9-11). Moreover, appellee, a publisher of magazines, clearly would have no difficulty complying with a requirement that illustrations of currency must be in publications. Accordingly, we submit that appellee lacks standing to challenge this requirement. "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, *supra*, slip op. 20. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973); *United States* v. *Raines*, 362 U.S. 17, 21 (1960).[19] Although the Court has carved out an exception to this proposition where a party raises a First Amendment overbreadth claim (see *New York* v. *Ferber*, *supra*, slip op. 21), appellee's challenge to the requirement of Section 504(1) that illustrations of currency must appear in publications does not rest on a claim that these provisions are overbroad.

3. Appellee also asserts (Mot. to Aff. 27-28) that the statutory restriction as to color is "irrational" and that permitting appellee "to publish only black and white illustrations of money is substantially useless to its magazines." The purpose of the color restriction is to pre-

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[19] The Court in *Ferber* explained (slip op. 20) that this rule reflects the personal nature of constitutional rights and prudential limitations on constitutional adjudication. The Court further observed (slip op. 20-21; footnotes omitted):

> In *United States* v. *Raines*, *supra*, at 21, we noted the "incontrovertible proposition" that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," (quoting *Barrows* v. *Jackson*, 346 U.S. 249, 256 (1953)). By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face "flesh-and-blood" legal problems with data "relevant and adequate to an informed judgment."

vent the making of multiple plates or negatives—a crucial step in the process of producing an exact duplicate of United States obligations and securities. In response to a proposed amendment to Section 504(1) that would have permitted color reproductions of currency,[20] a representative of the Department of the Treasury made the following observations (J.S. App. 43a):[21]

> [P]ermitting the use of color illustrations would provide justification for possessing separate plates and negatives of the note, Treasury seals and serial numbers. This color separation process is a crucial step towards counterfeiting obligations. Under current law, only black and white illustrations are permissible; and therefore, only one negative in the printing process is required. Dropping the black and white restriction brings the legitimate printers a few steps closer to an actual counterfeiting operation. * * * The size restriction alone does not address the problem of widespread possession of color separation negatives, nor does it impact upon the availability of a ready-made alibi for the possessors.

The district court apparently accepted the opinions expressed by appellee's editors, in affidavits supporting appellee's motion for summary judgment, to the effect that the materials used to prepare appellee's illustrations of currency in color could not be used to counterfeit money (J.A. 146 & n.19). In our view, it was error for the court below to invalidate the statute on its face on the basis of these self-serving representations. In enacting Section 504(1), Congress relied on the advice of the Department of the Treasury, the Executive Branch department designated to administer and enforce the anti-counterfeiting laws, and determined that a ban on color illustrations of United States securities and obligations is necessary to protect against counterfeiting (see pages

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[20] H.R. 4275, 97th Cong., 1st Sess. (1981).

[21] The entire statement referred to in the text is included in an appendix to the jurisdictional statement at J.S. App. 40a-44a.

7-9, *supra*).[22] It is not the proper role of the courts to appraise the wisdom of Congress' judgment in this matter, so long as the statutory provision has a rational basis. The district court did not find that the color prohibition is irrational, and appellee's arguments on this score are entirely unpersuasive.

Contrary to appellee's assertion (Mot. to Aff. 28), the statutory provision requiring the destruction of negatives and plates does not eliminate the need for the restriction on color. It is the experience of the Department of the Treasury that negatives and plates are not always destroyed, but often find their way out of the print shop. Appellee itself cannot guarantee that its own plates and negatives will always be destroyed, but states only that it understands that such materials are disposed of "as a general matter."[23] Even if appellee could insure that

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[22] The Treasury Department continues to adhere to the position that "any permission to photograph and reproduce pictures of money, in color, would seriously weaken the safeguards designed to protect our currency" (J.A. 61). We note, in this connection, that Congress, in Section 504, differentiated between illustrations of currency in publications, and motion-picture films depicting currency, on the ground that counterfeiters do not use motion-picture films to prepare counterfeits. As a precaution, Congress nevertheless included a provision that prohibits the making of prints from motion-picture films except by permission of the Secretary of the Treasury (see note 6, *supra*).

[23] In an affidavit submitted in support of appellee's motion for summary judgment, Henry A. Grunwald, appellee's editor-in-chief, stated (J.A. 76-77):

> I understand that as a general matter, plates used in the production of covers for Time Inc.'s magazines are the property of the respective firms with which we have our printing contracts, and are routinely disposed of by the printers for their scrap metal value within a short time (say, 48 hours) after the print run is completed. The film from which the plates are made generally remains Time Inc.'s own property. We would be happy to comply with any reasonable requests from the Government for prompt destruction of the materials which are ours to destroy, and to seek suitable assurances from our

its plates and negatives would always be destroyed, this would not invalidate the statutory prohibition, for the government cannot obtain similar guarantees from every printer in the United States. It must be kept in mind that in assessing the constitutionality of the statutory scheme, the Court must consider not only appellee, but all others who would be entitled to publish reproductions of currency under the statute's provisions. See *Heffron* v. *International Society For Krishna Consciousness, Inc.*, *supra*, 452 U.S. at 654.

By the same token, appellee's claim that the ability to print black and white illustrations of currency is of no use to its magazines is an insufficient basis for declaring the statute unconstitutional. In permitting illustrations of currency to be included in publications, Congress in Section 504(1) sought to be responsive to the expressive needs of book, newspaper and magazine publishers. At the same time, however, Congress also had to weigh the legitimate needs of law enforcement in detecting and preventing counterfeiting. In effect, appellee is contending that Section 504(1) must be held constitutionally infirm because some publishers find it inconvenient or aesthetically unsatisfying to comply with certain statutory provisions aimed at accommodating these dual concerns.

This contention trivializes the protection of "freedom of expression" embodied in the First Amendment. Under the statutory scheme, appellee is free to publish color photographs of everything except United States currency, and it may use black and white illustrations of currency for expressive purposes. Whatever thoughts or ideas appellee wishes to express by means of an illustration of currency can be expressed through a black and white

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printers respecting prompt and secure disposal of the materials which remain with them.

Appellee admitted that, in one instance, the materials used in producing a photograph of United States currency were not destroyed until three months after publication of the photograph and only after a Secret Service agent had instructed appellee to destroy the materials (J.A. 32).

illustration.[24] Indeed, perusal of a recent edition of one of appellee's magazines shows that slightly more than one-half of the photographs published were in black and white. See Time, May 23, 1983. Thus, it is absurd to suggest that appellee's desire to publish color photographs of United States currency, one side of which is mostly black and white, constitutes a constitutionally protected "right" to freedom of expression. Simply put, appellee's editorial preference for color photographs of currency does not suffice to invalidate the statutory scheme on the ground that it "directly and dramatically abridges the freedom to communicate" (Mot. to Aff. 10).

In claiming a constitutional right to print color illustrations of money, appellee points out that, due to recent technological advances, its magazines increasingly have come to rely on color photographs to accompany their texts (J.A. 77, 84-85, 91-92). But these advances in technology have also helped to facilitate the work of counterfeiters while making detection and enforcement more difficult. As the Department of the Treasury noted (J.S. App. 41a) in response to the proposed amendment to Section 504(1):

> The very fact that the technology is so advanced and quality printing is so widespread makes the suppression of counterfeiting activities all the more difficult. Counterfeiters, like printers, have benefited from today's advanced technology. In both instances, the "elite technology" has been replaced by the photomechanical process.
>
> It is important that the legitimate possession of negatives of United States currency be held to an absolute minimum.

The Treasury Department further pointed out that "[a]n instant alibi will be created for manufacturing and pos-

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[24] Contrary to appellee's characterization, therefore, the statutory scheme is not designed to "ban the publication of *pictures*" (Mot. to Aff. 19; emphasis in original). Rather, it simply regulates the manner in which publishers may depict an item every person sees every day.

sessing currency negatives * * * if color illustrations are allowed * * *" (J.S. App. 43a).

Appellee also asserts (Mot. to Aff. 28) that it should not be subjected to the color requirement of Section 504(1) because the particular pictures of currency that it thus far has reproduced have been "dramatically offsize and distorted" and not capable of being used to deceive or defraud. But the facial validity of the statute ought not to turn on the particular character of one publisher's pictures. The statute was expressly designed to provide a general rule of easy and reliable application—on the basis of objective size and color criteria—without the necessity for a burdensome case-by-case review of each illustration of currency that a publisher might wish to print.[25]

Appellee's argument, at bottom, is that Congress may not constitutionally punish those who, without intent to deceive, publish illustrations of United States securities and obligations. If appellee is correct, then the government would be powerless to prevent appellee or any other publisher from printing full size, full color representations of $100 bills, so long as the publisher could validly claim that the reproductions "constitute important editorial material" (Mot. to Aff. 24) protected by the First Amendment. While a publisher may have a perfectly legitimate editorial purpose for reproducing an exact or substantially identical copy of United States currency, and may in truth lack any intent to deceive or defraud, individual purchasers of publications containing facsimiles might not share that innocent intent and might seek to pass the facsimiles to others. The statutory scheme at issue here is designed to safeguard against precisely this

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[25] Not only would the alternative of a case-by-case review impose an intolerable burden on the Secret Service, but requiring government agents to decide in each instance whether a particular illustration has a "capacity to deceive" (Mot. to Aff. 28) would run the risk of arbitrary and discriminatory enforcement based on the content of the message. See, *e.g.*, *Smith* v. *Goguen*, *supra*, 415 U.S. at 572-573; *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 108.

sort of situation, which carries the potential for widespread deception and fraud.[26]

4. In sum, it is "fairly possible" to construe Section 504(1) so as to avoid the constitutional problems that the district court and appellee have perceived. If this Court concludes, however, that the statute cannot be saved by judicial construction, it should sever the two statutes and invalidate only Section 504(1), while leaving Section 474 ¶ 6 intact.

There can be no serious dispute that Section 474 ¶ 6 and 504(1) are severable. "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v.

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[26] This is not simply an abstract concern. We are advised by the Secret Service that a magazine entitled *Impacto*, which was published in Mexico in March 1982, contained a full size, full color reproduction of a United States $100 Federal Reserve Note. As of March 1983, 147 copies of that reproduction were reported as having been passed in locations throughout the United States.

It is important to recognize in this connection that, as a result of either gullibility or inattention on the part of the recipients, counterfeiters often succeed in passing bills that bear little resemblance to the genuine article. This point is graphically illustrated by the following anecdote in W. Bowen & H. Neal, *The United States Secret Service* 174 (1960):

> In one New York case a watchmaker actually shaved the Lincoln oval from the faces of many genuine $5 bills without cutting through the paper, thus creating a sort of oval panel. In this panel he pasted a halftone oval picture of a local politician, cut from campaign literature. Using stenciled inserts, he pasted the numeral 20 over the fives in the corners, scraped off the word "Five" wherever it appeared, and with pen and ink substituted the word "Twenty." Several of the bills were passed in stores—and one was actually traced by the Secret Service to the wife of the local politician whose picture was substituted for that of Honest Abe! She had received the bill in cashing a check in a department store, and the fact that she never noticed her husband's photograph typifies the carelessness with which most Americans examine their money.

Corporation Commission of Oklahoma, 286 U.S. 210, 234 (1932). See, *e.g.*, *Buckley* v. *Valeo*, *supra*, 424 U.S. at 108-109; *United States* v. *Jackson*, 390 U.S. 570, 585-591 (1968). Here, it is quite plain that Congress did not view the two statutes as inseparable, because they were enacted nearly a century apart.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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